EXCHANGE CONTROL AND THE CONFLICT OF LAWS: AN UNSOLVED PUZZLE

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The debenture accounts of Czechoslovakia's Skoda Works for 1930 record a purchase of three of their London sterling issue bonds by Dr. Richard Weiner, Prague. This entry is a part of a story of moderate professional success, of an admixture of faith in the strength of a new nation, in its vast munitions works, and of the bitterness of centuries of persecution which, in the midst of Europe's resurging anti-Semitism, caused cautious investment. For Dr. Weiner had bought these bonds through his Prague bank, the Anglo-Prague Credit Bank, with the stipulation that the actual purchase be made by the bank's London branch to be kept there on deposit, and that no evidence of the whereabouts of this deposit be left in writing. He died in 1935, leaving his entire estate to his sister, Mrs. Frankman. Supplemental to the inherited deposit contract stipulating that the bonds were payable in Prague, by the Prague bank, Mrs. Frankman received a conditions-of-business contract to the effect that the bonds were held for her in London and subject to English law.

Mrs. Frankman escaped the Aryan wave and died in England in 1945. The administrator of her estate turned to the London branch bank for payment of the debenture deposit. Fear of retaliation against family and friends in a newly totalitarianized Russia-oriented Czechoslovakia caused the officers of the London branch to ask for an English court order. Their defense in the subsequent litigation was that such payment would be illegal under Czechoslovakian exchange regulations, in force for two decades, requiring a license for all such payments in foreign currency by a Czechoslovakian citizen to a non-resident. The King's Bench Division upheld their defense,[1] saying that the validity of the second conditions-of-business contract, by the appropriate choice of law under conflict of laws doctrine, would be determined by the law of the "place of making," that Czechoslovakian law would hold the contract invalid, that the "place of performance" was Czechoslovakia in as much as the London branch was not a separate entity, that payment would have to be made in Prague, and that therefore the Czechoslovakian exchange restriction, as the law of the place of performance,

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1. Frankman v. Anglo-Prague Credit Bank, [1948] 1 All E.R. 337 (K.B.).

controls under traditional conflict of laws doctrine. The court further said that such foreign exchange restrictions could not be disregarded as contrary to English public policy because England and Czechoslovakia, as signatories of the International Monetary Fund were bound to recognize such exchange controls.[2]

The case was first reviewed by the Court of Appeal.[3] It sought to avoid giving effect to this foreign decree by resort to a conflicts doctrine peculiar to England, the "proper law" doctrine: the intention of the original contracting parties was that the contract was to be governed by English law, English law would upheld the validity of this contract-of-intention, therefore English law governs and the payment order issues—a neat double flip off the common law springboard! But, on a second appeal, the House of Lords refused to follow this nimble argument and, adopting the view of the Kings Bench Division that Czech law controlled the contract and barred its performance, reversed the decision and restored the judgment of the trial court.[4]

The history of the *Frankman case* affords an apt illustration of the conflicting rules and policies at stake when the courts are faced with the problem of the applicability of foreign exchange controls. The convolutions of the Court of Appeal are not so devious or difficult to master that other judges in other jurisdictions have not attempted them in order to reach a result which to them seems more desirable.

I

From the exigencies of a modern economic world have emerged a series of problems international in scope, reflecting national political and legal oppositions, entangled in that bramblebush of heterogeneous doctrinal legalisms aptly entitled conflict of laws.[5] The draftsman of a contract with international ramifications, wherever payment is involved, whether it be as possible measure of damages or value, or payment in a normal commercial transaction, is faced today with the problems of how to avoid or give effect to existent and possible future foreign exchange controls, and of how to stipulate with assurance the currency of payment and the law to be applied.[6] From the sales con-

2. See *infra* at note 92 for further exposition of this argument.

3. [1948] 2 All E.R. 1025 (C.A.).

4. [1949] 2 All E.R. 671, *sub nom.* Zivnostenska Banka National Corporation v. Frankman.

5. The equivalent French terminology is *conflit du droit,* the German *internationale Privat-recht.* Dicey has pointed out (CONFLICT OF LAWS, 12-15 Moore's ed. 1896) that the supposed conflict is in reality fictitious except in the mind of the judge and should be more properly termed "choice of law" or "international private law." The point seems at best academic.

6. The determination of the measure of foreign currency debt is derivative from the central problem at hand and can herein be treated only incidentally and without specific separation. For further discussion as regards the effect of supervening cur-

tract to the marriage contract he is constantly spooked by the phantasmagoric vicissitudes of our national and international legal systems. A foreign decree or enactment may become the excuse and legally framed defense of the private contractor who finds it convenient to avoid the contract; there is ample room for collusion with the government, and it may be a tool for contravention of intergovernmental obligations. A relatively substantial body of case law has formed around this malignant growth, and has been most commonly dealt with within the area of the conflict of laws. These traditional difficulties have been many times multiplied by the construction of the contraption known as foreign exchange control.

II

Exchange control, though probably put to use in virtually every period of international commerce, has only recently become of prime importance. The twentieth century has seen the introduction of the modern sophisticated theories of international trade. The Keynesian school and its successors have come to consider as normative a theory of international trade well divorced from the golden days of the free exchange rate and the little boat-loads of gold bullion conveniently balancing the neat diagrams of the exponents of the classical school. With a vastly more complicated economic world underscoring the artificiality of national boundaries and the unequal distribution of the resources of the world, the sensitivity of national economic and political structures to international commerce has become increasingly apparent.[7]

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rency devaluation particularly of the United States' gold manipulations of the mid-30's, see NUSSBAUM, MONEY IN THE LAW §§ 22, 36 (1939). In Hartmann v. United States, 65 F. Supp. 397 (Ct. Cl. 1946), *cert. denied,* 330 U.S. 842 (1947), plaintiff, executor of a deceased resident of Switzerland, sued the United States for $1,053,132, the difference between the alleged value in gold coin of certain United States Liberty Loan Gold Bonds with interest, and the amount received therefor in devalued currency; the court held for the United States in its interpretation of the 1935 Executive Order for redemption in legal tender, not gold, pursuant to the 1934 gold standard abrogation, stating that the bonds were purchased in the United States, to be performed on in the United States, so United States' law applies. See also LAMBERT, UN PARÈRE DE JURISPRUDENCE COMPARATIVE (1934), and *infra* note 46.

7. On the development of exchange controls in general, see: Egyes v. Magyar Nemzeti Bank, 71 F. Supp. 560 (E.D.N.Y. 1947), see *infra* at note 48, a case typifying the growing problem and its connection to subsequent devaluation; DOMKE, TRADING WITH THE ENEMY IN WORLD WAR II, ch. 20,317 (1943); EVITT, EXCHANGE AND TRADE CONTROL IN THEORY AND PRACTICE (1945); COMMERCIAL POLICY IN THE POST-WAR WORLD (League of Nations Publications IIA: Econ. & Financial Comm.) (1945); REPORT ON EXCHANGE CONTROL (League of Nations Publications IIA: Econ. & Financial No. 10 (1938)) (an early study which throws up its classic hands in horror at the vicious back-alley practices considered); SCHUMACHER, *The Lessons of Monetary Experience* in GERMANY'S PRESENT CURRENCY SYSTEM, 203, 225 (Gayer ed. 1937); Bloch and Rosenberg, *Current Problems of Freezing Control,* 11 FORD. L. REV. 71 (1942); Metzler, *Exchange Rates and the International Monetary Fund* in 7 POST-WAR ECONOMIC STUDIES (Board of Governors of the Federal Reserve System (1947)) (a brief, lucid, statistical study); Nussbaum, *Ex-*

Two lines may be traced to the fertilization and full flowering of exchange controls. With the world-wide depression of the last decade the perhaps already latent imbalance of world trade became startlingly emphasized. Probably in all cases the origin of the control can be traced to a deterioration of the balance of payments.[8] In 1936 international exchange rates were relatively stable and the imposition of exchange controls was restricted to certain states in Latin America and Eastern Europe. But this balanced demand for foreign exchange did not last long. The French franc and the English pound sterling were gradually depreciating and, from this stagnation of depreciation, emerged the structure of the exchange controls.

The modern master of the art of exchange restriction as a weapon of economic warfare was unquestionably Nazi Germany.[9] We must surely pay her due homage, but the rest of us were not slow to learn, and such restrictions are now almost universally employed. As perpetuated after the war, exchange controls probably reflect rather than create the baleful radiations of a feverish international economy. Though the Bretton Woods Agreement recognizes the necessity for these restrictions [10] they are to be withdrawn as soon as possible by progressive stages.

The restrictions take on many varied attire, now cleverly disguised in the mantle of benevolent commercial agreement, now unabashed and naked. Analysis of the degrees of exhibitionism is beyond our scope. Apparently there are no particularly comprehensive studies of the effects of such restrictions,[11] but no very good case can be made for their retention after the factors originally responsible for their conception have quite apparently ceased to exist. Thus there are decided retrogressive effects on international balance of payments in that there is bound to be a discouragement of cross-border capital investment. The imposition of added difficulties in already risk-burdened commerce may be determinatively stultifying. Furthermore there are indications that exchange controls cause an inevitable overvaluation which will decrease the exports of the country and discourage foreign

change Control and the International Monetary Fund, 59 YALE L.J. 421 (1950); Rehbock, *Note,* 32 REVUE CRITIQUE DE DROIT INTERNATIONAL 478 (1937) (a summary of the early German devices); Note, 3 INTRAMURAL L. REV. 62 (1947); Note, 34 VA. L. REV. 697 (1948); Comment, 47 YALE L.J. 451 (1938).

8. See reference in REPORT ON EXCHANGE CONTROL (League of Nations Publications IIA: Economic and Financial No. 10) 22 (1938).

9. See in particular Rehbock, *Note,* 32 REVUE CRITIQUE DE DROIT INTERNATIONAL 478 (1937). Much of the earlier body of case law in this area springs from these German exchange controls.

10. See analysis *infra* at note 92.

11. In general, however, see references made in note 7 *supra.*

trade even if devaluation has been superimposed.[12] It is of interest, too, that the current horrible held over our heads, "statism," was appended as an evil derivative from exchange controls in 1938—under its perhaps more subtle French equivalent, *etatisation.*[13] Constructive criticism of our current contortions is at best speculative—it generally succumbs to the temptations of negation. However, it is difficult to see how any direct positive operation on these restrictions, even admitting their essential evil, can be of particular merit given a chronic imbalance of world trade. Indeed speculative surgery on the latter becomes yet more platitudinous.

III

And now the Law.

In 1901 Edward VII was to celebrate his coronation with a splendid parade. One Krell had assured himself of later conversational popularity by renting the use of an excellent vantage point, the second floor window of Mr. Henry's Victoria Street shop. It must have rained, for there was no parade. And Mr. Henry hung on to his prepayments. Krell was litigious and the King's Bench Division saw his point of view, for they bucked the hitherto undisturbed flow of the common law and read into the rental contract an implied condition that the parade actually take place. *Krell v. Henry*[14] is one of the famous series of Coronation Cases which represents the first mitigation of the old common law rule that impossibility of performance is not a defense to a breach of contract.[15] It has been doctrinalized under the descriptive term "frustration." Other exceptions have appeared to the original prohibition, probably all stemming from Krell's argument of implied condition, and have been adopted in various forms in most of the civil law jurisdictions as well.[16] Within this doctrine of frustration has developed the concept of illegality—supervening impossibility

12. Thus a caveat to those who find a too ready panacea in recent pound and franc devaluation.

13. In particular, reference is made to REPORT ON EXCHANGE CONTROL (League of Nations Publications II A: Economic and Financial No. 10) 37 (1938).

14. [1903] 2 K.B. 740.

15. This, of course, is treated in all the contract treatises. See, *e.g.:* POLLOCK, PRINCIPLES OF CONTRACTS 236 *et seq.* (11th ed. 1942); CHESHIRE AND FIFOOT, THE LAW OF CONTRACTS 366 *et seq.* (1945); WILLISTON, CONTRACTS § 1931 *et seq.;* RESTATEMENT, CONTRACTS § 454 *et seq.* See also: Paradine v. Jane, 82 Eng. Rep. 897 (1648) (representing the unexpected common law position); Bathurst, *Adjustment on Discharge of a Contract by Supervening Impossibility Under English Law,* 11 J.B.A.D.C. 246 (1944); Morris and Cheshire, *The Proper Law of a Contract,* 56 L.Q. REV. 320-339 (1940); Zepos, *Frustration of Contract in Comparative Law and in the New Greek Civil Code of 1946,* 11 MOD. L. REV. 36 (1948); Note, 3 INTRAMURAL L. REV. 62 (1947); Note, 89 SOL. J. 76 (1945).

16. The Scandinavian Sale of Goods Act adopts this same "implied term" principle. By the French and Italian Codes there is release only in the case of a *cause etrangere qui ne peut lui etre imputee* (Article 1147, FRENCH CIVIL CODE) or of *force majeure* or *cas fortuit* (Article 1148, FRENCH CIVIL CODE).

due to change of law.[17] Domestic application of illegality is not without difficulty; its position in the international conflict of laws is further complicated. No state can make any law which of its own force is operative in another state.[18] But in some situations, for comity and other reasons, courts of one jurisdiction have tended to recognize the laws of other jurisdictions. The emergent rules have become the Conflict of Laws.

If taken only as an area of higher ground in the general quagmire of contract conflicts doctrines,[19] it is perhaps excusable to postulate the maxim that in a conflict of laws situation all but the essential validity of a contract is governed by the *lex loci solutionis*. This position probably represents the majority of American opinion, though Professor Beale has stuck to the rather more formal doctrinal approach of relating all matters to the law of the place of making, the *lex loci contractus*. The British position is by no means unanimous, particularly as regards this problem of illegality. In general, modern English courts talk in terms of the "proper law" of the contract. That is, the court will look to the law intended by the parties if such an expression is made; if not, the implied intention is presumed to be the *locus solutionis*—thus neatly tumbling into a position quite the twin of the American doctrine. Of the English commentators, Dicey takes the position that illegality at place of performance invalidates the contract, Mann holding that this exception to the common law doctrine of impossibility is not valid and relying rather on the principles of the "proper law." [20]

A criticism of "proper law" has been that it is mere verbalistic subterfuge for the essential issue—whether there has been a contravention of the "public policy" of the state.[21] This is apparently a reflection of the thesis that the exception of "change of law" in the common law of impossibility grew out of considerations of public policy rather than of the intentions of the parties.[22]

17. The doctrine of illegality, again, has received thorough treatment. See, *e.g.*: CHESHIRE, PRIVATE INTERNATIONAL LAW 345-353 (3d ed. 1947); Freutel, *Exchange Control, Freezing Orders and the Conflict of Laws*, 56 HARV. L. REV. 30 (1942); Mann, *Proper Law and Illegality in Private International Law*, 18 BRIT. Y.B. INT'L. L. 97 (1937); Nussbaum, *Conflict Theories of Contracts: Cases versus Restatement*, 51 YALE L.J. 893-923 (1942); Note, 3 INTRAMURAL L. REV. 62 (1947); Note, 34 VA. L. REV. 697 (1948).

18. RESTATEMENT, CONFLICT OF LAWS § 1 (1934).

19. "The resigned conclusion of commentators and courts alike is that the branch of the conflict of laws dealing with contracts is probably the most confused field in American law." Note, 62 HARV. L. REV. 647 (1949).

20. Mann, *Proper Law and Illegality in Private International Law*, 18 BRIT. Y.B. INT'L. L. 97, 112, 113 (1937).

21. This position is found in Morris and Cheshire, *The Proper Law of a Contract*, 56 L.Q. REV. 320 (1940).

22. Note, 3 INTRAMURAL L. REV. 62 (1947).

Judicial utterance of these perhaps basic considerations of public policy has been far more popular in American courts than in any others. The Swiss courts frequently speak in terms of the *ordre public,* a term of greater legal significance and validity than our vague "public policy," but the majority opinion still looks to the intention of the parties, the place of performance being evidence thereof.[23] This theory admits more freely than does the English "proper law" that the parties have an autonomous choice, and consequently subjects itself to the general criticism that the parties are given the privilege of private legislation, a conclusion which, however just, is difficult to see as particularly objectionable.

IV

In examining litigated situations in which an exchange restriction has been raised as a defense for an abrogation of a contractual relationship,[24] a categorization dependent on the "nationality" of the restriction and of the governing law is found convenient. The immediately recognizable risk arising from such division is that the latter criterion is one of legal conclusion rather than of factual determination. However, the instances where the legal conclusion is other than that indicated by this arbitrary categorization will be fully evident. "Nationality" will be symbolized as "X," "Y," and "Z," and the treatment will be fourfold.

(1) *Forum X, Restricting Law X, Governing Law X.* On first blush it would appear that cases fitting these criteria are of no significance in the field of the conflict of laws, and they have received just such summary treatment by the commentators.[25] There have, however, in the past few years been several important American cases which raise questions of interpretation of domestic exchange restrictions as one of perhaps several defenses, and can be properly treated here.

Hartmann v. United States[26] involved interpretation of the Executive Orders of 1934 and 1935 effectuating America's relinquishment of the gold standard and devaluation of her legal tender. A nonresident alien bought United States Government bonds, issued and

23. *E.g.,* Banco Aleman Transatlantique v. Societe de Banque Suisse, 63 Entscheidungen des Schweizerischen Bundesgerichtes II 383 (Switzerland).

24. For recent treatments of the legal problems of exchange restrictions see: DOMKE, TRADING WITH THE ENEMY IN WORLD WAR II, ch. 20 (1943); Cohn, *Currency Restrictions and the Conflict of Laws,* 55 L.Q. REV. 552 (1939); Freutel, *Exchange Control, Freezing Orders and the Conflict of Laws,* 56 HARV. L. REV. 30 (1942); Note, 34 VA. L. REV. 697 (1948); Comment, 47 YALE L.J. 451 (1938).

25. Freutel, *Exchange Control, Freezing Orders and the Conflict of Laws,* 56 HARV. L. REV. 30, 39 (1942); Note, 34 VA. L. REV. 697 (1948).

26. 65 F. Supp. 397 (Ct. Cl. 1946); see also *supra* note 6.

payable in the United States in gold. Congress later prohibited further dealings in gold, the bonds were redeemed in paper currency, and suit was brought for the balance. The Court of Claims denied recovery, holding that an alien who acquires bonds issued in the United States and subject to the law of the United States becomes, so far as the bond is concerned, subject to such law to the same extent as an American citizen.

There have been several cases where the effect of American wartime exchange controls of 1941, Executive Order 8389,[27] has been used as a defense. In *Leeds v. Guaranty Trust Co. of New York et al.*[28] the plaintiff was the assignee of a debt owed an alien by the defendant bank. The bank insisted that the Executive Order posed the condition precedent to such a debt transfer of a license which was in this instance not forthcoming. It was held by the New York court that such a license was not a condition precedent, but was only required to enable the defendant to make payment over to plaintiff of the deposited debt. This follows the reasoning of the earlier *Polish Relief Commission v. Banca Nationala a Rumaniei*[29] which held that these same United States exchange regulations do not prevent the levy of an attachment which gives the court jurisdiction to dispose of funds subject to the regulations. The New York courts have also held that the Executive Order does not affect title to choses in action nor the liability of an estate.[30]

(2) *Forum X, Restricting Law Y, Governing Law X.* There is a distinct class of situations wherein it is no great acrobatic feat for it to be held that by quite prosaic application of current conflict of laws doctrine the "nationality" of the governing law is that of the forum. That this, nevertheless, is a stated legal conclusion, to repeat our caveat introducing this categorization, cannot be ignored. Yet the bait of such Hornbookery as the following morsel is well nibbled, and the trap has snared some commentators:

> In cases where the contract is governed by the law of the forum, no effect can be given to the law of the country imposing the restriction even though the debtor be a citizen or domiciliary of the restricting country[31] and even though it is impossible for him to make payment.[32]

27. 12 U.S.C.A. § 95, p. 456 h.
28. 65 N.Y.S.2d 431 (Sup. Ct. 1946).
29. 288 N.Y. 332, 43 N.E.2d 345 (1948).
30. A/S Meriland & Co. v. Chase National Bank of City of New York, 189 Misc. 285, 71 N.Y.S.2d 377 (Sup. Ct. 1947); In re Mason's Estate, 194 Misc. 308, 86 N.Y.S.2d 232 (Sup Ct. 1948). Both these cases used this point only for secondary defense and will be dealt with further in category (4) *infra.*
31. Barnes v. United Steel Works Corp., 11 N.Y.S.2d 161 (Sup. Ct. 1939).
32. Note, 34 VA. L. REV. 697, 698 (1948).

The original attack on a foreign restriction was based on theoretical grounds designed to precede any conflicts doctrine. The position is best stated in *Tweedie Trading Co. v. McDonald Co.*,[33] a case which is still, unfortunately, cited in order to undermine any contradictory conflicts doctrines.[34] Here it was stated that foreign law in general is not given effect because impossibility is not an excuse at common law, but that local law is given effect because prevention by local law makes a contractual promise illegal.[35] The more conventional approach to the situation, giving effect to the traditional conflict of laws doctrine, *lex loci solutionis,* is expressed in *Central Hanover Bank & Trust Co. v. Siemens & Halske Aktiengesellschaft.*[36] Here the defendants had issued bonds in the United States, payment to be made in New York. Suit was brought for collection and defendants argued that German exchange law prevented payment and destroyed the means of performance contemplated by the parties. It was held that German restrictions had no application since the contract was governed by United States law and that payment could be made from funds outside of Germany just as well. Moreover, the fact that the defendants might incur German penalties was immaterial.[37] Some foreign corporate debtors have argued that the rule subjecting corporations to the laws of their domicile requires them to submit to any restrictions imposed by their home governments even as to assets located in the forum. But that argument has met with no more success than the impossibility argument.[38]

The restricting law in *David v. Veitscher Magnesitwerke Actien Gesellschaft*[39] was a Nazi decree forbidding employee pension payments to Jews. The plaintiff employee brought the action in Pennsylvania against his former Austrian employer. As the plaintiff was asking payment in the United States from assets of the defendant deposited in the United States the court purred place of performance, and held for the plaintiff under Pennsylvania law. This would seem to be quite an obvious extenuation of the conflict of law doctrine, and most

33. 114 Fed. 985 (S.D.N.Y. 1902).
34. Note, 3 INTRAMURAL L. REV. 62 (1947).
35. For opposition from an astonishing quarter, see 6 WILLISTON, CONTRACTS § 1938 (1936).
36. 15 F.Supp. 927 (S.D.N.Y.), *aff'd,* 84 F.2d 993 (2d Cir.), *cert. denied,* 299 U.S. 585 (1936).
37. This case represents and is cited by those of the more introspective nationalistic approach. Thus: ". . . [O]ur courts are not forcing him [the defendant in the *Siemens* case] to violate the law of his country but are merely applying our own law to property located here . . . Inability to marshal the necessary funds has never been a defense to an action for failure to pay a debt." Freutel, *supra* note 24, at 50.
38. *E.g.,* Perry v. Norddeutscher Lloyd, 150 Misc. 73, 268 N.Y.S. 525 (N.Y. City Court 1934); see Comment, 47 YALE L.J. 451, 454 (1938).
39. 348 Pa. 335, 35 A.2d 346 (1944); 92 U. OF PA. L. REV. 451 (1944).

probably it was considerations of public policy which were of determinative importance. This case represents the forewarned borderline and will be mentioned again in the fourth category.[40] The history of the *Frankman* case[41] represents what is perhaps the typical judicial maneuver—unsuccessfuly attempted there by the Court of Appeal—to find a governing law the same as that of the forum. A relatively plausible interpretation of the facts was used to find that the forum was the *locus solutionis.*

(3) *Forum X, Restricting Law Y, Governing Law Z.* This situation seems to be rather less frequently before the courts, partly because the facts are more complicated and less likely to come up, and probably also because courts in general have shied from injecting further investigation of foreign law into the litigation and have tended to turn to an interpretation wherein the controlling factors point to either "X" or "Y." In the cases which do come up clearly involving "Z," the result appears to depend, through a renvoi step, upon the attitude taken toward exchange restrictions by the country whose law governs the obligation.[42] In *Lann v. United Steel Works Corp.*[43] the defendant, a German corporation, issued bonds containing an optional currency clause permitting the holder to require payment in either Germany, Holland, or Sweden. After the defendant had called the issue for redemption before maturity, the plaintiff presented her bonds for payment in Holland, was refused, and subsequently brought suit in New York. Allowing recovery, the court held that the plaintiff, by exercising her option, had fixed the place of payment in Holland. Consequently Dutch law governed, and under Dutch law German currency legislation was not a defense.

(4) *Forum X, Restricting Law Y, Governing Law Y.* The problems derivative from this type of situation are most interesting and diverse of solution. In the past, except in extremely unusual situations,[44] it has generally been held that courts will disregard foreign exchange restrictions even though by uncontroverted conflict of laws doctrine the governing law is that of the foreign restricting country rather than that of the forum. This may be in part due to a wartime

40. See *infra* at note 45.
41. See *supra* at notes 3 and 4.
42. *E.g.*, Pan-American Securities Corporation v. Fried, Krupp Aktiengesellschaft, 169 Misc. 445, 6 N.Y.S.2d 993 (Sup. Ct. 1938), *aff'd*, 256 App. Div. 955, 10 N.Y.S.2d 205 (2d Dep't. 1939).
43. 166 Misc. 465, 1 N.Y.S.2d 951 (Sup. Ct. 1938).
44. See, in particular, NUSSBAUM, MONEY IN THE LAW 487 (1939): "Apart from very special situations, the various jurisdictions confronted with this problem have been practically unanimous in refusing to apply foreign exchange control enactments."

atmosphere where the restriction in question is quite surely an affirmative measure of economic warfare.[45] Recent cases indicate a more evenly divided judicial opinion, at least in the Anglo-American courts.

Typical of this class of cases is the "passage money" variety where the plaintiff, a refugee, purchases a ticket from defendant, a steamship company, entitling him to a passage from Europe to New York. He pays for the ticket in blocked currency, and thereafter the passage is cancelled due to the outbreak of war. But plaintiff eventually reaches this country and sues defendant in New York for a refund of his passage money. Defendant claims that plaintiff is entitled only to blocked currency in Europe. In such situations the numerical weight of authority seems to favor sustaining the defense based on exchange control,[46] but many cases have reached the opposite result.[47]

There are several recent cases, other than this "passage money" type, giving effect to a defense of exchange control impossibility where the nationality of the governing law is the same as that of the restricting law.

In *Egyes v. Magyar Nemzeti Bank et al.*[48] the plaintiff was an American assignee of an Hungarian obligee bond holder. The suit was brought against the Hungarian National Bank for payment in dollars of the interest on Hungarian government bonds. Interest accumulations had been deposited by the government in the bank in pengoes. The subsequent depression had made the pengo worthless, and in 1935 the government declared a moratorium on any payments in foreign currency. The pengo recouped somewhat for a time, World War II dealt it the death blow and it has recently been replaced by the forint. Here the court held that although the plaintiff has a lien on the deposited pengoes, there is no obligation for the defendant to controvert the moratorium decree and make payment in dollars at a rate of exchange in line with the current forint-dollar rate. *Kraus v. Zivnostenska Banka*[49] holds similarly where a Czechoslovakian decree is involved. Plaintiff is suing for dollar payment of a very large

45. For further general comment see also Note, 23 VA. L. REV. 288, 289 (1937).

46. *E.g.* Lowenhardt v. Compagnie Generale Transatlantique, 35 N.Y.S.2d 347 (Sup. Ct. 1942); Branderbit v. Hamburg-American Line, 31 N.Y.S.2d 588 (2d Dep't. 1941), *aff'd*, 266 App. Div. 1011, 45 N.Y.S.2d 188 (2d Dep't. 1943). In Translateur v. United States Lines Co., 179 Misc. 843, 42 N.Y.S.2d 117 (Sup. Ct. 1943), it was held that German law was impliedly part of the contract. Also, Steinfink v. North German Lloyd S.S. Co., 176 Misc. 413, 27 N.Y.S.2d 918 (Sup. Ct. 1947); Werfel v. Zivnostenska Bank, 260 App. Div. 747, 752, 23 N.Y.S.2d 1001, 1005 (1st Dep't. 1940).

47. *E.g.*, Bleiweiss v. Cunard White Star Ltd., 34 N.Y.S.2d 172 (Sup. Ct. 1942); see, Weiden, *Foreign Exchange Restrictions*, CONTEMPORARY LAW PAMPHLET, series 1, no. 11, p. 43.

48. 71 F. Supp. 560 (E.D.N.Y. 1947).

49. 187 Misc. 681, 64 N.Y.S.2d 208 (Sup. Ct. 1946).

kronen pre-war deposit made in the defendant Czechoslovakian national bank. Here the decree already in force requiring license for such foreign payments (noted in the *Frankman* case *supra* [50]) is upheld as a defense by the New York court. Justification beyond pure conflict of law theory is found in offsets to a public policy conscience such as a specific contractual agreement to be bound by domestic exchange restrictions and the fact that the exchange controls were devised prior to Nazi occupation of Czechoslovakia.

State of Netherlands v. Federal Reserve Bank of New York et al.,[51] in upholding the State of the Netherlands' action to replevy securities looted from Holland during the Nazi occupation and later coming into American hands, again supports the foreign restriction. The government's regulation was to the effect that all such securities were expropriated by the government. Here Judge Medina's federal court rather apologizes for its decision and points out that the foreign regulation in no way opposed American public policy.

The long-standing Czechoslovakian licensing requirement is given effect too in a recent English case, *Kahler v. Midland Bank, Ltd.*[52] The plaintiff's Canadian government bonds were bought through a Prague bank and deposited in the defendant London bank with title listed as being in the Prague bank. Here the court comes perhaps somewhat closer to grounding its decision on conflict of laws theory, though some mention is made of England's obligation under the International Monetary Fund agreement.[53]

There are several recent cases refusing to recognize these foreign exchange regulations though freely admitting that by traditional application the nationality of the governing law would be that of the restricting law. *In re Mason's Estate* [54] is a claim against a deceased's estate on debts arising in Italy and paid by the deceased by check. The checks were not honored on presentation by the payee due to the intervening death of the drawer. The defendant administrator looks for defense to Italian regulations existing at the time of the drawing of the check prohibiting distribution of dollars by check. The verbalistic argument resorted to by the New York court in refusing to sustain this defense was that adequate showing of the foreign law was not made; the court refused to exercise its discretionary judicial notice, though perhaps the less formal reasons were grounded in considerations of predispositions and public policy.

50. See note 1 *supra*.
51. 79 F. Supp. 966 (S.D.N.Y. 1948).
52. [1948] 1 All E.R. 811 (C.A.).
53. For a further dicussion of the "obligation", see *infra* at note 92.
54. 194 Misc. 308, 86 N.Y.S.2d 232 (Sup. Ct. 1948). This category of cases clearly overlaps category 2.

In *A/S Meriland & Co. v. Chase National Bank of City of New York* [55] the plaintiff, originally an Esthonian corporation, sued for its dollar deposit account with the defendant bank. Shortly after this deposit had been made Esthonia was incorporated into the Soviet Union and nationalization decrees were applied to plaintiff's steamship company. However, before effectuation of the decree, plaintiff's directors, meeting in Sweden, had transferred the seat of their corporation to Stockholm. The defendant bank refused payment on the grounds that Executive Order 8389 blocked the account and that the Soviet Union's decree must be recognized as controlling. The first argument was dispensed with by the court on the familiar basis that the Order does not affect title.[56] The second defense was quite frankly given no weight on public policy grounds, being confiscatory and without jurisdiction as to assets in the United States.

Marcu v. Fisher [57] distinguishes the *Kraus* case discussed above [58] in refusing the effect of the Czechoslovakian exchange regulation by pointing out that in the *Kraus* situation the control was already in effect and was distinctly to be performed in Czechoslovakia. In this case, then, there has been resort to perhaps more doctrinal grounds rather than the more usual public policy arguments. The *Frankman* [59] case as it came down from the Court of Appeal—is a more awkward development of the doctrinal approach with quite apparent undercurrents of public policy.

V

The comparatively short history of adjudication of this type of situation has produced a great variety of reasons for avoiding the application of foreign exchange controls. In many instances, courts have simply misapplied ordinary choice of law principles,[60] or employed those which suited their purpose.[61] In at least one instance a court has resorted to a concept of restitution as distinguished from damages,[62] and there has been some adoption of the jurisdictional argument mentioned *supra* in the *Meriland* decision.[63] In other cases courts have

55. 189 Misc. 285, 71 N.Y.S.2d 377 (Sup. Ct. 1947).
56. See *supra* at note 27.
57. 65 N.Y.S.2d 892 (Sup. Ct. 1946).
58. See note 49 *supra*.
59. Discussed *supra* at note 3.
60. *E.g.*, Kassel v. N.V. Nederlandsch Amerikaansche Stoomvaart Maatschappij, 177 Misc. 92, 24 N.Y.S.2d 450 (Sup. Ct. 1940), erroneously stating that a demand for refund in New York made New York the place of performance.
61. See LORENZEN, TERRITORIALITY, PUBLIC POLICY AND THE CONFLICT OF LAWS 15 (1947).
62. Bleiweiss v. Cunard White Star, Ltd., 34 N.Y.S.2d 172 (Sup. Ct. 1942).
63. *Supra* note 55. See also Sabl v. Leanderbank Wien Aktiengesellschaft, 30 N.Y.S.2d 608, 621 (Sup. Ct. 1941), *modified*, 33 N.Y.S.2d 764 (Sup. Ct. 1942), *aff'd*, 266 App. Div. 832, 43 N.Y.S.2d 270 (1st Dep't 1943).

looked to the old common law doctrines of impossibility, differentiating between foreign and domestic municipal law.[64] It has also been suggested that local courts may disregard exchange restrictions imposed by another country because they are procedural in nature.[65] However exchange restrictions seem no less substantive than other rules concerning the excuses for performance which are regularly applied as part of the governing law.[66]

There is an Anglo-American rule, developed from the common law doctrine, that foreign penal and revenue laws will not be enforced, and it is to this rule that some courts have looked in managing to disregard the relevant exchange legislation.[67] This view clearly disregards the true character of exchange regulations, for they are neither primarily for tax or revenue purposes nor penal in the sense of "designed to punish offenses against the public." [68]

French courts frequently apply a doctrine of territoriality—*stricte territorialité.*

> Foreign exchange regulations are of fiscal character. Their purpose is the strengthening of the financial power of the government or country and they are handled and executed by the financial department of the government. For this reason they have no extraterritorial effect. Furthermore, they contradict the public policy of the other country where performance can be had or compelled. These laws may *de facto* prevent or delay payment to be made by a person within the country, but cannot impair contractual rights or the property of persons without the country.[69] These reasons apply with greater force where a country for its own emergency purposes is compelled to control the foreign funds and the recognition of laws of another country would weaken the effect of the application of its own regulations. . . .
>
> The conclusion is that under the rules of conflict of laws comity may be urged to give effect and recognition to foreign

64. Lann v. United Steel Works Corp., 166 Misc. 465, 470, 1 N.Y.S.2d 951, 957 (Sup. Ct. 1938).

65. See Bloch and Rosenberg, *Current Problems of Freezing Control,* 11 FORDHAM L. REV. 71 (1942); Domke, *Foreign Exchange Restrictions (A Comparative Survey)* 21 J. COMP. LEG. & INT'L. L. (3d series) 54, 58 (1939).

66. Freutel, *Exchange Control, Freezing Orders and the Conflict of Laws,* 56 HARV. L. REV. 30, 47 (1942).

67. *E.g.,* Bollack v. Societe Generale, 263 App. Div. 601, 604, 33 N.Y.S.2d 986, 989 (1st Dep't 1942), *aff'd,* 293 N.Y. 652, 56 N.E.2d 253 (1944), 47 YALE L.J. 451, 459, n. 54 (1938).

68. Weiden, *Foreign Exchange Restrictions,* 16 N.Y.U.L.Q. REV. 559, 575 (1939); Huntington v. Attrill, 146 U.S. 657, 673 (1892). In Cermak v. Bata Akciova Spolecnost, 80 N.Y.S.2d 782 (Sup. Ct. 1948), the court rests its decision in part on this principle without any particularly intelligent comment; see further reference to this case at note 100 *infra.*

69. 151 Entscheidungen des Reichsgerichts in Civilsachen 116 (1936); *Decision of Kammergericht,* JURISTISCHE WOCHENSCHRIFT 2449 (1936).

> laws, but foreign exchange legislation of other countries is purely local and should have no extraterritorial effect unless advantageous to the economic policy of the [forum].[70]

That exchange controls are, on the contrary, extraterritorial in the extreme seems apparent. Exchange controls are necessarily designed to affect the foreign debtor.[71]

Again, civil-law courts, aiming at the same result, have relied on the theory that foreign exchange control forms part of foreign "public law." Although exchange control is largely, perhaps mostly, a matter of "public law" (that is, administrative law), it has important effects on the law of contracts and with these very alterations foreign courts are concerned. Moreover there is no plausible reason why a court in a situation governed by foreign law should shrink from using the "public law" provisions of the applicable legal system.

In the vast majority of cases the explanation of the refusal of courts to give effect to foreign exchange regulations, where under ordinary choice of law principles they are applicable, is that they are repugnant to public policy.[72] Even where such measures are emergency in nature, born of economic crises, they should be disregarded since they are an attempt to support the economy of the restricting nation at the expense of foreign creditors. Thus it has been pointed out [73] that a restriction may interfere with the interests of the domestic creditor to a greater extent then a foreign bankruptcy law and is not entitled to a higher degree of recognition; it is contradictory to public policy because of its generally discriminatory aim and its role as an economic weapon. Perhaps the war has given the greatest impetus to this judicial delving into matters political.

There may be no moral or ethical structure directly involved in the public policy concept, though public policy is self-motivated and has to envisage only domestic interests; where public policies collide, the court applies that of its own country. In *Goodman v. Deutsch-*

70. Bloch and Rosenberg, *Current Problems of Freezing Control,* 11 FORDHAM L. REV. 71, 86-87 (1942).

71. For citations to French, Swiss, Austrian, and Norwegian cases see NUSSBAUM, MONEY IN THE LAW, 487 n. 3 (1939).

72. See, *e.g.,* DOMKE, TRADING WITH THE ENEMY IN WORLD WAR II, ch. 20 (1943); Note, 3 INTRAMURAL L. REV. 62 (1947).

73. *See* Weiden, *Foreign Exchange Restrictions,* CONTEMPORARY LAW PAMPHLETS, series 1, no. 11, p. 43: "Foreign Exchange Restrictions have no extraterritorial effect regardless of the intention of the foreign legislation. They leave the debt intact. They regulate only the stream of capital from one country to another. The American Court has to give judgment in its own currency. . . . The restrictions interfere with the interests of the American creditors to a greater extent than a foreign bankruptcy law and are not entitled to a higher degree of recognition. They are contradictory to our public policy because of their discriminatory effect and their specific aims."

Atlantische Telegraphen Ges. the court declined to resort to the public-policy argument, since it was "not necessary to assume the pharisaical posture and thank Providence we are not like other people." [74] Nevertheless the court rejected the defendant's answer based on German exchange control; although the contract expressly provided that the defendant's obligations were "covered" by German law the court felt that "covered" is not "governed," and that they were "governed" by American law. For this reason, the court brushed aside German exchange control legislation. Invocation of public policy would have been far preferable to this kind of reasoning!

Public policy considerations, if further judicially spelled out, generally contain elements of concern over retroactive legislation, confiscatory measures, or violation of some principle of reasonable classification. Intimately tied to one or all of these are considerations of expediency. So long as foreign exchange controls are deemed repugnant to domestic public policy, such controls will in one way or another be denied effect. Given current conditions of international irresponsibility, this result is legitimate and widespread and no persuasive legal arguments can be advanced to condemn it. A theory that there must be a material contact of the case with the forum to warrant employment of the public policy test [75] is not supported by the authorities, for the mere fact that the court has jurisdiction creates the necessary contact to invoke public policy.[76] The territorial vested rights theory, wherein it is said that no right exists to be enforced by the forum since it has been cut down by the restriction of the place of performance, may be circumvented by allowing recovery on a restitution theory. If there is no quasi-contractual remedy, it is generally stated that exchange restrictions should still not be permitted to block recovery.[77] A theory that governmental recognition validates all the actions and conduct of the government [78] does not seem to deter the courts generally.

Contracts made subsequent to the exchange restrictions and with knowledge thereof raise a question as to this validity, the answer to which often hinges on the attitude of the forum toward such restrictions. In most instances a better course would probably be to invoke the doctrine of *in pari delicto* and leave the parties as they stand.

74. 166 Misc. 509, 510, 2 N.Y.S.2d 80, 81 (Sup. Ct. 1938).

75. See Husserl, *Public Policy and Ordre Public,* 25 VA. L. REV. 37, 66 (1938).

76. *Cf.,* Oscanyan v. Arms Co., 103 U.S. 261, 277 (1880), 38 COL. L. REV. 1490, 1492 (1938).

77. Freutel, *Exchange Control, Freezing Orders and the Conflict of Laws,* 56 HARV. L. REV. 30, 59 (1942).

78. *See* Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918).

VI

Faced with a case where under ordinary choice of law principles foreign exchange regulations are applicable, courts must draw on a body of law confused, tortuous, and conflicting. Yet the situation and its judicial outcome may be of considerable political importance and are not to be dallied with in the exasperating whimsy so often set down as considered opinion. And by no means to be exonerated are the commentators, though their guilt, by common penal definition, is to be measured in terms of influence on judicial decision and is to that extent doubtful. The initial body of conflicts law where contractual obligation is involved differs between and sometimes within jurisdictions, yet is obviously of immense importance. Perhaps the most rational approach is the American contact theory,[79] which looks to the law of the place where the most important contacts are. However, even given such a rational solution to the initial step there is still anarchy in the community of the commentators. Are exchange controls *per se* immoral and to be ignored,[80] can we disregard foreign restrictions because they are purely territorial,[81] or because they have specific discriminatory and vicious aims and effects? [82] Given conditions wherein there are no formalistic international obligations relevant to the problem at hand there is nevertheless visible the outline of a more rational approach. With a lessening of wartime international animosities the bases of exchange restrictions can be more clearly defined, indicating that they may well be more than weapons in economic warfare; courts are given the opportunity of more objective inspection of the public policy considerations. If they are found still to be relevant, no abstract theory of choice of law is going to be decisive, though it should not be obscured. If, on the other hand, public policy loses its relevance and it appears that such restrictions have become less monstrous and a regretable necessity in postwar international economics—something more than a purely unilateral act [83]—then it becomes incumbent on the courts to apply a rational choice of law doctrine and maintain the position indicated.

79. See Nussbaum, *Conflict Theories of Contracts: Cases versus Restatement*, 51 YALE L.J. 893 (1942).

80. Freutel, *supra* note 77, at 58.

81. Bloch and Rosenberg, *supra* note 70, at 87.

82. *Supra* note 73, at 43.

83. With the play of private international financial transactions subject to exchange restrictions, there is the parallel problem of what is to be the future status of pledges, made by foreign governments under conditions of free convertibility, that they would service external debt in dollars or other specially designated foreign currency. Australia has recently officially committed herself to give priority in the disposition of available exchange reserves to the service of public debt held abroad. New York Times, Nov. 1, 1949, p. 37, col. 5. This may well become the basis for a new kind of indenture for the protection of bondholders abroad against currency shortages.

Yet from the point of view of the draftsman of the international contract such remains largely in the realm of abstraction. That a debtor may not rely for relief on exchange controls seems quite apparent. Creditor protection is in practice currently sought in a number of ways,[84] differing to a great extent with the individual situation. A stipulation that exchange controls will not alter the contractual obligation is probably ineffectual, though if it specifically designates that exchange authority approval is necessary to make the contract operative there seems to be at least temporary protection.[85] Perhaps the most frequent combination is to require payment through a letter of credit established in a bank of the creditor's country with the additional security of a surety foreign to the debtor's country. If the debtor is excused on the defense of exchange control, the surety might seek to avail himself of the same defense. However this argument is without merit; one reason for obtaining such a surety is obviously to protect the creditor against extraordinary political events in the debtor's country. Exchange legislation falls within the contemplated risk. This is an example of the familiar principle that a different law may govern the obligations of debtor and surety.[86] Prepayment is of course a solution but is generally not feasible.[87]

There are some indications that the problem will find at least partial solution through national and international legislation. As yet still in the drafting stage are two complementary proposals: Rabel's Uniform Law on International Sale of Goods, and a similar uniform law of international conflict of laws.[88] Such uniform international

84. Derived from correspondence with several American banks with substantial international contacts.

85. Note, 62 HARV. L. REV. 647 (1949) (championing express stipulation in contracts as to governing law).

86. RESTATEMENT, SECURITY § 82(f) (1941).

87. A case in point where some security was obtained by partial prepayment is the following, taken from the files of the American Arbitration Association, 1946: A contract between an American dealer and an American buyer for the sale of Canadian pulp wood, stipulated in its payment terms: ". . . A letter of credit is to be established in New York City for payment of United States funds through the Irving Trust Company of New York; terms of payment to be as follows:— 85% to be paid upon presentation of satisfactory bills of lading indicating actual delivery to the Railroad Company for destination as above specified (omitted). The final 15% to be paid upon satisfactory delivery at destination. Final measurement and inspection to be made at destination. The seller if he so desires may have his representative check arrival, measurement and inspection at destination. . . . It is understood that the (dealer) will make adjustment of any difference in exchange between American and Canadian funds as each draft is drawn, and that remittance will be sent directly to (the buyer)." Thus, though exchange fluctuations are accounted for to a certain extent in that the buyer has protected himself by reserving 15% of payment until delivery and could hold this if the dealer becomes, say, insolvent in the period between drawing on the draft and remitting the exchange rate differential, there is still a risk on the buyer of exchange fluctuations between the time of drawing the final 15% and remitting.

88. UNIFICATION OF LAW, INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (1948); BAGGE, INTERNATIONAL UNIFICATION OF COMMERCIAL LAW (1948).

laws have yet to be tested, though they may prove valuable even if they remain available only for individual stipulation of controlling law. It is to be noted, however, that a committee working for the League of Nations a decade ago was unable to find a solution in the form of a uniform law applicable to the problem of frustration of international contractual obligation.[89] Perhaps the more immediately practical and available solution is to be found in intelligent national legislation defining national policy and requiring recognition of foreign restrictions in stipulated instances.[90]

The practically universal resort to exchange control has been reluctantly accepted if not institutionalized in resolutions of the League of Nations [91] and in the Charter of the International Monetary Fund.[92] The Charter, which has the effect of a multilateral treaty between its signatories, recognizes that these restrictions are manifestations of the basic imbalance of world trade which must in the long run seek a more basic cure,[93] but it further speaks of exchange control as hampering and perpetuating this imbalance.[94] Under the Fund Agreement restrictions on "current transactions" (commercial transactions) are permitted during the "transitional period" [95] and if a currency becomes so scarce that the Fund will have to apportion its supply among the members. The objectives are quite apparently flouted in two respects.

First, Article VIII section 2(b) encourages members to "cooperate" in effectuating their mutual exchange controls.[96] Second, and most important in its effects on the conflicts of laws problems, is the following sentence from Article VIII section 2(b)(1):

> Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement, shall be unenforceable in the territories of any member.[97]

89. See PROJET D'UNE LOI INTERNATIONALE SUR LA VENTE, 32 *et seq.* (1935); RAPPORT SUR L'ACTIVITE DE L'INSTITUT INTERNATIONALE DE ROME POUR L'UNIFICATION DU DROIT PRIVÉ 10 (1938-39); GUTTERIDGE, COMPARATIVE LAW 67 (1946).

90. Zepos, *Frustration of Contract in Comparative Law and in the New Greek Civil Code of 1946,* 11 MOD. L. REV. 36 (1948).

91. REPORT ON EXCHANGE CONTROL 3 (League of Nations Publications II A: Economic and Financial No. 10) (1938); 1937 League of Nations General Assembly.

92. UNITED NATIONS MONETARY AND FINANCIAL CONFERENCE: FINAL ACT AND RELATED DOCUMENTS, Publication 2187 (U.S. Dep't State 1944).

93. Article I (ii).

94. Article VIII §2(a).

95. Article VII §3(b), and Article XIV §2, both referred to in Article VIII §2(a). By Article XIV §4 the transitional period ends five years after the Fund begins operations.

96. The Fund thus appears to give preference to special bipartite and multipartite arrangements.

97. A discerning analysis of this section has been made by Professor Nussbaum in *Exchange Control and the International Monetary Fund,* 59 YALE L.J. 421 (1950). Its effect is, however, at best largely speculative and can be dealt with here only summarily.

An inspection of this reveals many uncertainties. "Exchange contracts" probably was not intended to include those transactions which, though often governmentally regulated, are not directly concerned with international media of payment.[98] So if such transactions, involving, say, securities or merchandise, are invalid under the law of the "country of the currency", other countries are not compelled to hold them, by the Agreement, unenforceable. Further, this section apparently envisages validation of "exchange controls . . . maintained or imposed consistently with this Agreement", thus giving it a retroactive effect, though many of the "maintained" restrictions will not be "consistent" with the Agreement.[99]

The efficacy of international treaties on domestic legal institutions is generally treated with circumspection by the courts. The Fund Agreement is no exception, for, though its applicability is often urged by the litigant, courts have thus far found other more convenient grounds for decision.[100] The *Frankman* case perhaps gave greatest weight to the Agreement, though the upper court chose to look to other aspects in its reversal. This zenith was reached in the statement of the lower court: "The Bretton Woods Agreement shows that such restrictions (namely, exchange restriction of member states generally) are honored by the members of the International Monetary Fund," a position far too generalized in the light of the ambiguities of the Agreement. It would seem that, in fact, Article VIII by itself offers scant succour to the anemic international contractor.

VII

This area of investigation, involving international conflicts of law stemming so apparently, even to the legalist, from domestic economic problems, affords an unusually vivid view of the unveiled considera-

98. This would include contracts for sale of foreign securities or contracts for import or export, particularly where price determination is in foreign currency.

99. In the Frankman case *supra* notes 3 and 4, for example, reference is to exchange controls held over from the German occupation of Czechoslovakia. As to the effectiveness of the Agreement, see also: EVITT, EXCHANGE AND TRADE CONTROL IN THEORY AND PRACTICE (1945); COMMERCIAL POLICY IN THE POST-WAR WORLD (League of Nations Publications II A: Economic and Financial Committee) (1945); METZLER, EXCHANGE RATES AND THE INTERNATIONAL MONETARY FUND, POSTWAR ECONOMIC STUDIES No. 7 (Board of Governors of the Federal Reserve System 1947).

100. *E.g.*, Kraus v. Zivnostenska Banka, 187 Misc. 681, 64 N.Y.S.2d 208 (Sup. Ct. 1946); Cermak v. Bata Akciova Spolecnost, 80 N.Y.S.2d 782 (Sup. Ct. 1948), ". . . The court of no country executes the penal (or the revenue) laws of another. . . . If the . . . Bretton Woods (Agreements) are to change that rule, I will at least await a decision of some appellate court blazing that trail or a case before me in which that point is briefed and decision of it is actually necessary;" Werfel v. Zivnostenska Banka, 260 App. Div. 747, 23 N.Y.S.2d 1001 (1940); Kahler v. Midland Bank, Ltd., [1948] 1 All E.R. 811 (C.A.).

tions of public policy applied by the courts. When allusion is made to traditional conflict of laws rules it but thinly hides the decisive factors; more often than not these factors of public policy are stated as primary. As has been indicated before, this bold approach was made possible by its inception in a period of selfrighteousness, of international distrust, of depression and war, giving rise to foreign exchange restrictions. In general there was refusal to give effect to restrictions discriminating against persons and property within the jurisdiction—moral and actual—of the court. There came to be a rationale, perhaps justifiable in time of war, which proclaimed as contra to public policy any foreign restriction which if enforced would give a nominal result different from a purely domestic treatment.

But the immorality of exchange control is no longer fresh; the evil of its conception fades. International organization has bestowed upon it a modicum of legitimacy. Judicial decision which has looked to purely domestic measure in applying or ignoring the doctrines of conflicts of law, must now look to situations which persist and grow in the international community even among friends. To give direction and vigor to the solutions of legal problems arising from exchange restrictions the prime standard must be that of legitimacy in the eyes of international organization. The Bretton Woods Agreement falters, and by precise interpretation becomes inadequate. But approval or disapproval of exchange restrictions through the medium of the multilateral treaty commitment that is the charter of the modern international organization must replace the public policy predispositions of the courts of the past.